

2003 DRAFTING REQUEST**Bill**

Received: 11/18/2003

Received By: pkahler

Wanted: As time permits

Identical to LRB:

For: Carol Owens (608) 267-7990

By/Representing: Jacque Dicks

This file may be shown to any legislator: NO

Drafter: pkahler

May Contact:

Addl. Drafters:

Subject: Dom. Rel. - cust./plac./vis.

Extra Copies:

Submit via email: YES

Requester's email: Rep.Owens@legis.state.wi.us

Carbon copy (CC:) to:

Pre Topic:

No specific pre topic given

Topic:

Permit court to make custody or physical placement orders on basis of future contingency

Instructions:

See Attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	pkahler 11/25/2003	kgilfoy 11/25/2003					
/1			jfrantze 11/26/2003		lnorthro 11/26/2003	lemery 02/09/2004	

02/09/2004 11:44:48 AM

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*None
needed*

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11/18/2003 10:18:10 AM

Page 1

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/?	pkahler	11 - 11/25 Kmg	11/26	J/ch 11/26			

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11-17-03

Rep Owens, by Jacques Dicks

see attached letter

would like legislation reflecting the
highlighted changes on p. 2

**BLOCK, SEYMOUR, CHUDACOFF,
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PAMELA S. MCAVOY

October 28, 2003

Rep. Steve Wieckert
Rm. 16 West-State Capitol
P.O. Box 8953
Madison, WI 53708

Dear Representative Wieckert:

I have spent over thirty years as a lawyer dealing with placement issues in family law cases. I am concerned about what I consider to be a significant defect in our current placement law. That law provides generally that after the first decision has been made by a court on the rules of placement it cannot be changed within two years unless there has been a substantial change in circumstances and unless there has been a determination that the children are suffering from current physical or emotional harm. There is also a presumption that there should not be a change. After two years there cannot be a change unless it is in the best interests of the children and there has been a substantial change of circumstances. Again, the presumption applies to limit changes.

The effect of the current law is that once a placement order has been made it is difficult to change it. This provides for some finality for the children and for the parties. However, family life is dynamic and what may be appropriate today may very well be destructive tomorrow. Recently, the Court of Appeals made a decision in *Culligan v. Cindric* which is reported at 669 N.W. 2d 175, a copy of which I am enclosing for you. That decision affirms the proposition that the courts do not have the power to make a placement decision contingent upon a future event occurring. Because the opinion is now published it is required that the courts follow it.

I believe that the *Culligan* decision is wrong in its determination that placement arrangements should not be changed due to the occurrence of future events or else is poor policy and that it should be changed by legislative action. The effect of this decision is to create many potential problems that are easily resolvable if there is more flexibility available to the courts. One example is that of parties who have a very young child who the mother is breast feeding. The practical problem will be that for several months at least it will be difficult for the father to have the child overnight or for other extended times. However, once the breast feeding ends that impediment ends with it. A judge should have the flexibility to order that overnight placement or

more extensive placement will begin when breast feeding ends or at least to be able to look at the situation at that time. Another example is that of a parent with a short term disability. For instance, she may have a broken arm and may therefore be unable to properly care for a child with special needs. The judge who hears this case under the *Culligan* rule may be forced to either give the child substandard care or to permanently give the child to the father when a short term order could solve the problem. One of my recent cases involved two parties both of whom the judge felt were unable to properly communicate and who might not be able to put the best interest of their children ahead of their personal animus. He decided that it would be appropriate to try something for a period of six months to see if it would work. If not, the judge wants to have to authority to try something else. In that case significant problems developed after the judge's order and a *Culligan* result could be that he has no authority to fix the problem. The *Culligan* case itself is a prime example of why a judge should have authority to make changes. In many similar cases, a father works a swing shift or works twelve hour shifts with rotating days off. While the children are younger he is able to spend time with them frequently on his days off even if they are during the week. However, once they start school that option is no longer available to him. A court wishing to preserve the relationship needs to be able to anticipate it and to make a ruling that when the children start school a change will have to occur. He or she should also be able to specify a default change in the event that the parties do not agree on what will happen. In the *Culligan* case the parties did reach an initial agreement to follow the judge's order which set forth the default modification. Now though, no one will have any incentive to do that because it could lead to the change being made mandatory. If they simply ignore the proposed change the other party may never be able to preserve the relationship that has developed.

Divorce is a traumatic enough experience for everyone. However, one aspect of it that is rarely dealt with is the substantial reduction in relationships that almost always occurs. A father or mother generally has almost daily contact with the children before the separation. However, as soon as the separation happens one of the parents may suddenly find himself or herself limited to every other weekend meaning that the children will not see that parent for days on end. We should be encouraging the relationship, not destroying it.

We do not want the judges to be in the position of micro managing the relations of the parents. However, it seems to me that we also do not want to prevent them from modifying decisions when necessary. There are numerous cases where flexibility is a crying need. I think that the placement statute should be modified to add the following or similar paragraphs:

Sec. 767.242)(d) The court may take into account temporary conditions affecting the ability of one or both parents to make decisions in the best interest of the children or events that are likely to occur in the future and reserve the option to or provide for adjustments to a custody determination or an allocation of decision making authority based upon a modification of a temporary condition or the occurrence of a future event.

767.24(2)(d)

Sec. 767.24(4)(a)3. The court may take into account temporary conditions affecting the ability of one or both parents to care for the children at the time of the original order or events that are likely to occur in the future and reserve the option to or provide for adjustments to the allocation of physical placement based upon a modification of a temporary condition or the occurrence of a future event.

Very truly yours,

Bruce Chudacoff

Bruce Chudacoff

BC/mjs



State of Wisconsin
2003 - 2004 LEGISLATURE

LRB-3764/

PJK:.....
KMG

~~PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION~~

- 1 AN ACT ^{general}; relating to: ordering modifications to legal custody or periods of
2 physical placement contingent upon the occurrence of a specified future event
3 or a specified change in conditions.

Analysis by the Legislative Reference Bureau

When ordering joint or sole legal custody of and periods of physical placement with a minor child in an annulment, divorce, legal separation, or paternity action, the court is required, under current law, to consider a number of factors, such as the amount and quality of time that each party has spent with the child in the past, the mental and physical health of the parties and the child, the child's adjustment to the home, school, and community, and the child's age and developmental and educational needs. Within the two-year period after an initial custody or physical placement order is entered, the order may not be modified unless the court finds that the modification is necessary because the current custodial conditions are physically or emotionally harmful to the child. After two years after the initial order is entered, the court may modify legal custody or physical placement if the court finds that there has been a substantial change in circumstances since the last order was entered and that the modification is in the child's best interest.

According to the case law, a court's authority in actions affecting the family is based entirely on the statutes, which with respect to determining legal custody and physical placement "embody a sense of contemporaneity⁹...." *In re Marriage of Koeller v. Koeller*, 195 Wis. 2d 660, 666 (1995). Therefore, the court lacks the authority to ~~look at~~ ^{prospective} ~~current conditions and modify~~ include in a custody or physical placement order a modification of custody or physical placement contingent ^{that is} upon the occurrence of a future event or a change in current conditions.

This bill explicitly authorizes a court, when determining legal custody or physical placement, to take into account events that are likely to occur in the future or temporary current conditions that affect a party's ability to perform parental duties or to care for the child. In a legal custody or physical placement order, the court may provide for future modifications to, or retain the option to modify at a future time, legal custody or physical placement upon the occurrence of a specified future event or a specified change in current conditions. The statutes that apply to modifications of custody and physical placement orders before and after two years after an original order is entered do not apply to these contingent modifications that are included in an order.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 767.24 (5m) of the statutes is created to read:

2 767.24 (5m) MODIFICATION CONTINGENT ~~ON~~ ^{UPON} FUTURE EVENT OR CHANGE IN
3 CONDITIONS. (a) In making an order of legal custody under sub. (2) or (3) or periods
4 of physical placement under sub. (4), the court may take into account events that are
5 likely to occur in the future or temporary current conditions that affect the ability
6 of one or both parties to make decisions in the best interest of the child or to perform
7 parental duties and responsibilities or to care for the child and may provide for future
8 modifications to, or retain the option to modify at a future time, legal custody, the
9 authority to make major or other specified decisions, or periods of physical
10 placement, contingent upon the occurrence of a specified future event or a specified
11 change in temporary current conditions.

12 (b) Modifications to legal custody or periods of physical placement under this
13 subsection are not subject to s. 767.325.

14 **SECTION 2.** 767.325 (intro.) of the statutes is amended to read:

15 **767.325 Revision of legal custody and physical placement orders.**

16 (intro.) Except for matters under s. 767.327 or 767.329, and except as provided in

1 s. 767.24 (5m) (b), the following provisions are applicable to modifications of legal
2 custody and physical placement orders:

3 History: 1987 a. 355, 364; 1995 a. 27 s. 9126 (19); 1999 a. 9.

3 **SECTION 3. Initial applicability.**

4 (1) This act first applies to actions or proceedings, including actions or
5 proceedings to modify a judgment or order previously granted, that are commenced
6 on the effective date of this subsection.

7 (END)

Northrop, Lori

From: Dicks, Jacque
Sent: Monday, February 09, 2004 11:17 AM
To: LRB.Legal
Subject: Draft review: LRB 03-3764/1 Topic: Permit court to make custody or physical placement orders on basis of future contingency

It has been requested by <Dicks, Jacque> that the following draft be jacketed for the ASSEMBLY:

Draft review: LRB 03-3764/1 Topic: Permit court to make custody or physical placement orders on basis of future contingency